No. 78-873

In the Supreme Court of the United States

OCTOBER TERM, 1978

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

WADE H. McCREE, JR.,
Solicitor General,
DREW S. DAYS, III,
Assistant Attorney General,
LOUIS F. CLAIBORNE,
Deputy Solicitor General,
JESSICA DUNSAY SILVER,
MARIE E. KLIMESZ,
VINCENT F. O'ROURKE, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

297-435—79——1

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78–873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether the Emergency School Aid Act authorizes the Department of Health, Education, and Welfare to withhold the special funds provided under that statutory program from a school district whose faculty assignment policies have a disparate racial impact not justified by educational needs, without a showing that they violate the Equal Protection Clause.

STATEMENT

1. The Emergency School Aid Act, 20 U.S.C. 1601–1619,[1] invites local educational agencies to compete for the limited funds appropriated each year "to meet the special needs incident to the elimination of minority group segregation." 20 U.S.C. 1601(b)(1). Applications are reviewed by HEW's Office of Education and are ranked according to criteria set out in the statute, 20 U.S.C. 1609(c), as implemented by HEW's regulations, 45 C.F.R. 185.14. The essential first step is a determination (20 U.S.C. 1605(d)(4)) that the applicant is not ineligible by reason of the requirements of 20 U.S.C. 1605(d)(1) (Pet. Br. 4–6). Such determinations are made initially by HEW's Office for Civil Rights in accordance with the statute and applicable regulations, 45 C.F.R. 185.01 *et seq.*, especially 45 C.F.R. 185.11 and 185.41–185.45. The burden is on the applicant to establish its eligibility.[2]

[1] By Title VI of the Education Amendments Act of November 1, 1978, Pub. L. No. 95-561, ESAA was re-enacted with amendments immaterial here and recodified at 20 U.S.C. 3191–3207. Because they govern this case, we refer throughout to the textual provisions as they stood before November 1978, and, following the opinions below and Petitioners' Brief, we cite the old Code sections.

[2] A school district found to be ineligible may apply for a waiver of ineligibility. The waiver provision of the statute authorizes the Secretary to permit funding of otherwise ineligible applicants, if the applicant submits such information and assurances as the Secretary may require (20 U.S.C. 1605(d)(1))—

> in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include[s] such provisions as are necessary to insure that such activities do not reoccur after the submission of the application.

The waiver provision is not involved here. Subsequent proceedings provoked by HEW's denial of a waiver to petitioner Board are presently pending on appeal before the Court of Appeals for the Second Circuit. See Pet. Br. 21 n.*.

2. Petitioner[3] filed three applications for ESSA assistance for fiscal year 1977 (A. 57). Petitioner's Basic Grant Application,[4] which is at issue here, was revised to meet minimum program standards and obtained a sufficient ranking to be considered for funding in the amount of $3,559,132 (A. 56–58). However, on July 1, 1977, HEW informed petitioner that it failed to meet the eligibility requirements of the statute (A. 27–41).

After an informal meeting on July 22, 1977, at which the board was given an opportunity to show cause why the ineligibility determination should be revoked, HEW withdrew some of its allegations (A. 60). HEW concluded, however, that the board had not demonstrated a sufficient basis for revocation of the finding that the school district was ineligible under 45 C.F.R. 185.43(b)(2) as a result of "the assignment of full-time classroom teachers to [its] schools * * * in such a manner as to identify [one or more] of such schools as intended for students of a particular race, color, or national origin."

The July 1, 1977 letter discussed in detail the statistical evidence from which HEW concluded that it was possible to identify a large number of schools as intended for either minority or nonminority students, based solely upon the composition of the teaching staffs. That evidence showed that in the New York

[3] We use the singular throughout to denote the central New York City School Board, the only applicant whose request for ESAA funds is still contested. See Pet. Br. 8 n.**. The Chancellor of the City School District is a nominal co-petitioner.

[4] One application failed to meet the minimum program standards set out in the regulations, 45 C.F.R. 185.24 (A. 57). A second, proposing a bilingual project, could not be funded because available funds were exhausted before petitioner's application was reached according to rank order (*ibid.*).

City school district during the 1975–76 school year, 62.6 percent of the high school students were minority students, while 8.3 percent of the high school teachers were members of minorities (A. 42). However, 70 percent of these minority high school teachers were assigned to schools in which the minority student enrollment exceeded 76 percent (A. 29). Conversely, in high schools in which the minority student enrollments were below 40 percent, there was a disproportionately low percentage of minority teachers (A. 42–43).

In the junior high schools and elementary schools,[5] the pattern was the same. The percentage of minority junior high school teachers was 16.7 percent. These minority teachers were concentrated in the community school districts with the highest percentages of minority students (A. 29). At the elementary level, the city-wide percentage of minority teachers was 14.3 percent. Those minority elementary teachers similarly were employed primarily in the community school districts with the largest minority student enrollments (A. 28–29).

In addition to this statistical evidence of racial identifiability of teacher assignments, HEW also relied upon its prior findings that petitioner was in violation

[5] Prior to 1969 when a decentralization law became effective in New York City, assignments of teachers for all schools were made by the Chancellor of the City School District (A. 80). Following decentralization, initial authority for appointment and assignment of teachers to elementary and junior high schools was given to 32 Community School Boards, subject to the powers retained by the Chancellor (A. 81). Because the Chancellor retained ultimate authority over assignments to all schools, Educ. L. 2590-e(2), HEW relied for its findings of ineligibility on the racially identifiable assignment of faculty at the elementary and junior high school levels, as well as the high school assignments which were under the direct control of petitioners (A. 28–30).

of Title VI of the Civil Rights Act of 1964, as set out in its November 9, 1976 letter (A. 7–18) to Chancellor Irving Anker (A. 30):

> In summary, your policies, practices, and procedures, which have been discussed at great length in the aforementioned November letter and have permitted these patterns [of assignment] to develop, have resulted in discrimination on the basis of race, color or national origin in the recruiting, hiring, and assignment of minority teachers, assistant principals, and principals.[6]

The "policies, practices, and procedures" discussed in the November letter included hiring and selection procedures which limited the opportunity for minority teachers to be assigned to the high schools and special schools and to elementary and junior high schools in which the reading level of students was greater than 45 percent of the city-wide average (A. 9–12).[7]

3. Shortly after notification by HEW that the finding of ineligibility would not be withdrawn, petitioner filed this action challenging the denial of ESAA assistance. The complaint did not challenge the accuracy or sufficiency of HEW's statistics showing the racial identifiability of its teacher assignments (A. 129–149).

[6] The issue of assignment of principals and assistant principals was not finally resolved by the district court and is therefore not at issue here.

[7] In 1969, state law governing appointment and assignment of teachers was amended to allow an alternative hiring method for teachers in elementary and junior high schools where the reading level of students is below the 45 percentile of the reading scores for the entire district (A. 80). This method resulted in the hiring of a greater number of minority teachers for the "45 percentile schools"—a stated purpose of the legislation (A. 82). Since the 45 percentile schools were themselves predominantly minority schools, the result was the disproportionate assignment of minority teachers to minority schools (A. 12).

Instead, petitioner took the position that the racially identifiable assignments resulted from the requirements of state law, the provisions of their collective bargaining agreement, licensing requirements for particular teaching positions, the provisions of a federal court consent decree concerning bilingual instruction,[8] and demographic changes in student population; intentional or purposeful discrimination was denied (A. 134–139).

Initially, the district court, after reviewing the administrative record, upheld HEW's determination of ineligibility as having a reasonable basis. Concerning petitioner's explanations for the substantial statistical disparities in teacher assignments, the court stated (A. 69–70):

> In this respect, considering the high school statistics, the State statutes, the United Federation of Teachers agreements, the wishes of individual Black principals, the desires of the individual Parent-Teachers Associations, community school board and Black and White communities, the Administrator could find a practice, policy or procedure after June 23, 1972, resulting in the identification of schools as intended for students of a particular race, color or national origin through the assignment of teachers to those schools.

However, after a hearing on the petitioner's motion for reargument, the court concluded that HEW had not in fact considered the school board's proffered justifications to be relevant to a determination of ineligibility under the regulation (A. 103–104). The court therefore remanded the matter to HEW for further consideration consistent with its opinion (A. 107).[9]

[8] *Aspira of New York, Inc.* v. *Board of Education*, 72 Civ. 2004 (S.D.N.Y. Aug. 29, 1974).

Following the administrative hearing held on remand, HEW notified petitioner that its explanations for the racially identifiable staffing pattern did not adequately rebut the *prima facie* evidence of discrimination shown by the statistics (A. 107). HEW's letter of March 22, 1978, to the Chancellor of the City School District discussed each of the justifications offered by the school district and demonstrated why each was insufficient (A. 111–114).

Petitioner again sought review of HEW's denial of ESAA funding in the district court. On April 18, 1978, that court entered its judgment finding that HEW's determination that petitioner was ineligible for ESAA funding was supported by substantial evidence (A. 150–153). The court of appeals affirmed the judgment of the district court dismissing petitioners' complaint. Noting that "[i]rrespective of how the teachers are appointed, ultimate control still remains with [petitioners]" (Pet. App. 12), the court demonstrated that at all levels, high school, junior high school, and elementary school, there was a correlation between the racial/ethnic composition of the faculty and the racial composition of the student bodies (Pet. App. 13–15). In the court of appeals, petitioner did not contest the finding that its schools were racially identifiable "as a result of the significant disparities in staff assignments" (Pet. App. 18). Rather, petitioner maintained,

[9] The district court required HEW to find either an illegally segregated faculty prior to June 23, 1972, which was not thereafter desegregated, or a practice after that date which was segregative in intent, design, or foreseeable effect (A. 103–104). The court stated that "the Constitution mandates that the plaintiffs must have an opportunity to rebut a statistical *prima facie* case of discrimination" (A. 104).

297-435—79——2

as it does here, that HEW was required "to establish that the disparities resulted from purposeful or intentional discrimination in the constitutional sense" (Pet. App. 18-19). The court of appeals rejected this contention and did not address the question whether purposeful discrimination had been demonstrated. The court found that Congress had the authority (Pet. App. 23–24 & n. 38), and "* * * intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an *unjustified* disparity in staff assignment" (Pet. App. 25; emphasis added).

The court of appeals fully considered petitioner's asserted justification for the disparate effect of its conduct and concluded that HEW's denial of funding was not arbitrary or capricious and that the available data "clearly support[ed] HEW's determination" (Pet. App. 26). The court held (Pet. App. 26–27):

> [t]he proffered justifications * * * (1) restrictions on the transfer of teachers written into the collective bargaining agreement, (2) the desirability of teaching assignments in those schools, (3) the unwillingness of many non-minority teachers to teach in predominantly minority schools and (4) the unequal distribution of licenses in specific areas.

were either inadequate as a matter of law or were unsupported by the facts. Specifically, the court found that (Pet. App. 27):

> [t]he unequal distribution of licenses resulted from the very examinations which [HEW] previously determined had produced a racially significant disparate impact [and which had not been found to be job-related (A. 104)]. Leaving aside whether the remaining justifications are sufficient as a matter of law, they have not been supported by adduced facts appearing on the record.

Petitioner's request for rehearing was denied on October 6, 1978. On October 31, 1978, the court of appeals granted petitioner's motion for a stay of mandate preserving the ESAA funds pending application to this Court for a writ of certiorari. On February 21, 1979, this Court granted a writ of certiorari, thereby continuing in effect the stay issued by the court of appeals. See Rule 41(b), Fed. R. App. P.

ARGUMENT

INTRODUCTION AND SUMMARY

1. The present case has a complex history and might furnish a pretext for elaborate discussion of a number of issues. Thus, because, on remand, the Department of Health, Education, and Welfare found that petitioner's teacher assignment policies were unconstitutional and the district court affirmed, we might debate the correctness of that finding on the administrative record. But the court of appeals expressly avoided that question and, in that posture, it seems to us inappropriate to argue it here.[10] So, also, we eschew persuing the dictum of the court of appeals to the effect that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, condemns practices having a disparate racial impact although no purposeful discrimination is shown. That brief aside is no part of

[10] So saying, we of course do not abandon the administrative finding, affirmed by the district court, that petitioner's faculty assignment policies violated the Equal Protection Clause. On the contrary, in our view, the statistical evidence (see pages 3–4, *supra*; Pet. App. 13–19 & nn.24–32) makes out a *prima facie* case of purposeful discrimination which was not effectively rebutted. But the correctness of that ruling will only become an issue if this Court should remand the case to the court of appeals for further proceedings.

the decision which this Court has undertaken to review.

Nor is it necessary here to define with precision the scope of the so-called "disparate impact" test. It is common ground that the regulation applied by HEW does not require a finding that the school system declared ineligible has acted with a purpose or intent or motive to discriminate on a racial basis. There is no equivocation: under the regulation, a school board is ineligible for ESAA funds if it has assigned full-time teachers to schools "in such a manner as to identify any of such schools as intended for students of a particular race, color or national origin." 45 C.F.R. 185.43(b)(2). That is an objective criterion and petitioner does not here challenge the finding that its policies have produced this disqualifying result. And, finally, there is no contention made that the conceded "disparate staffing patern" (Pet. Br. 60) was unavoidable. As we understand petitioner (Br. 55–67), its argument here is *not* that HEW or the courts below erroneously rejected proferred explanations or justifications for the disparate assignments, but, rather, that no finding that the pattern resulted from "intentional [or] purposeful discrimination" properly could be made on this record (Br. 55). In sum, unless the constitutional standard applies, it is effectively conceded that petitioner was permissibly denied ESAA funds.

There is, of course, no contention that, for the limited purpose of providing additional funding to educational agencies, Congress was not free to define eligibility more restrictively than the Equal Protection Clause requires. The issue is whether it intended to do so. Thus, in this Court, a single question is presented: Does the Emergency School Aid Act authorize the

withholding of the special funds thereby provided from a school board whose faculty assignment policies have a disparate racial impact, when those policies, although not shown to amount to purposeful racial discrimination in violation of the Equal Protection Clause, are not justified by educational needs. If, as the court of appeals held, an affirmative answer should be given, the case is at an end.

2. In our submission, the ruling of the court of appeals is fully supported by the text of the statute and its legislative history.

Although the immediately controlling words are ambiguous, their meaning is made plain when related provisions are examined. The other texts defining ineligibility establish a general objective approach, which focusses on effect rather than purpose. And the same emphasis is revealed in the statutory declaration of policy, which commands uniform rules in applying the Act to deal with "conditions of segregation," expressly "without regard to the origin or cause of such segregation."

The legislative history confirms the view that Congress intended the ESAA program to be governed by a disparate impact standard. The object of the so-called "Stennis Amendment," now 20 U.S.C. 602, was to treat *de facto* and *de jure* segregation alike in respect of the Federal funds to be provided. Thus, it was understood that present activities, not historic causes, would determine implementation.

This, indeed, is the only approach that accords with the congressional concern with racial isolation, regardless whether it was the product of intentionally discriminatory school policies or resulted more "accidentally." To remedy racial isolation that could be traced to no constitutional violation, the statute sought to encourage voluntary action by offering a financial

reward. Obviously, that required withholding funds even in the absence of judicially actionable default.

ELIGIBILITY FOR FUNDS UNDER THE EMERGENCY SCHOOL AID ACT IS DETERMINED BY A DISPARATE IMPACT STANDARD

The New York City School Board was denied funds under the Emergency School Aid Act because its faculty assignment policy was determined to violate the applicable regulation, which declares ineligible an educational agency whose full-time teachers are assigned in such a way as to identify schools as "intended for students of a particular race, color, or national origin," whether or not that result is the product of purposeful discrimination. 45 C.F.R. 185.43(b)(2).[11] As we have said, the question thus presented is whether such a rule is consistent with the statute.

1. The statutory words that govern this case, stripped of all context, are these from Section 1605 (d)(1) of the Act (Pet. Br. 4–5):

> No educational agency shall be eligible for assistance under [ESAA] if it has, after June 23, 1972–
>
> * * * * *

[11] The cited regulation provides:

"No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility), including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin."

> (B) * * * engaged in discrimination based on race, color, or national origin in the hiring, promotion, or assignment of employees of the agency * * *.[11a]

[11a] The subsection in full is as follows:

"(d) Ineligibility for transfer of property to segregated facility; waiver of ineligibility

"(1) No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—

"(A) transferred (directly or indirectly by gift, lease, loan, sale, or other means) real or personal property to, or made any services available to, any transferee which it knew or reasonably should have known to be a nonpublic school or school system (or any organization controlling, or intending to establish, such a school or school system) without prior determination that such nonpublic school or school system (i) is not operated on a racially segregated basis as an alternative for children seeking to avoid attendance in desegregated public schools, and (ii) does not otherwise practice, or permit to be practiced, discrimination on the basis of race, color, or national origin in the operation of any school activity;

"(B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency (or other personnel for whom the agency has any administrative responsibility);

"(C) in conjunction with desegregation or the conduct of an activity described in this section, had in effect any procedure for the assignment of children to or within classes which results in the separation of minority group from nonminority group children for a substantial portion of the school day, except that this clause does not prohibit the use of bona fide ability grouping by a local educational agency as a standard pedagogical practice; or

"(D) had in effect any other practice, policy, or procedure, such as limiting curricular or extracurricula activities (or participatiorn therein by children) in order to avoid the participation of minority group children in such activities, which discriminates among children on the basis of race, color, or national origin;

Standing alone, this provision is indeed ambiguous. Congress might be declaring ineligible for ESAA funds only school districts that have violated the Equal Protection Clause since mid-1972, or, with equal plausability, the term "discrimination" might—here, as in Title VII of the Civil Rights Act of 1964—intend also to embrace practices that have a disparate racial effect, even though no discriminatory purpose is shown. But, fortunately, we are not confined to these bare words: There is a history and a context to guide us.

2. The most obvious first step is to look at the remainder of the immediate text that governs our case. Subsection (B) of Section 1605(d)(1) (note 11a, *supra*) begins by declaring ineligible a school district that "had in effect any practice, policy, or procedure *which results* in the disproportionate demotion or dismissal of instructional or other personnel from minority groups" (emphasis added). As petitioner necessarily concedes (Br. 25), here Congress has unequivocally enacted an objective, "impact" test, and one would expect a like standard to apply to promotion, hiring and assignment of teachers and other employees.

In the absence of any clear indication to the contrary, this alone suggests that "discrimination" in Subsection (B) reaches all personnel actions having

except that, in the case of any local educational agency which is ineligible for assistance by reason of clause (A), (B), (C), or (D), such agency may make application for a waiver of ineligibility, which application shall specify the reason for its ineligibility, contain such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission of the application."

a discriminatory effect. Certainly, the phrase "engaged in discrimination" does not foreclose this reading. Indeed, the full phrase is "*otherwise* engaged in discrimination," thereby obviously characterizing as "discriminatory" the demotion and dismissal actions just noticed which merely have a disparate impact on minorities. Presumptively, then, assignment practices that have a like effect are equally condemned as "discrimination," regardless of purpose.

3. Although it would be odd, one can conceive of a statute that viewed disparate effect as sufficient to condemn demotion and dismissal practices but required proof of evil purpose in all other cases. That, however, is not our Act. When we go beyond Subsection (B) and notice the other grounds of ineligibility under ESAA, it is immediately apparent that an effect test is the general rule, not the exception.

Thus, Subsection (A) of Section 1605(d)(1) (note 11a, *supra*) disqualifies an educational agency that transfers property or makes services available to a private school system without first determining that the recipient does not practice discrimination. Here, plainly, eligibility requires more than absence of an invidious motive. The applicant for ESAA funds is barred even when it is merely negligent in failing to discover the character of the recipient, or when its purpose is purely financial rather than discriminatory.

So, also, in Subsection (C) of the same Section, which deals with the assignment of students to particular classes, or class sections or "tracks," within a school. To be sure, in this instance, the law expressly condones separation of a minority group if it is the consequence of "bona fide ability grouping." But, with only this exception, "any procedure * * * *which re-*

sults in the separation of minority group children for a substantial portion of the school day" is condemned, regardless of purpose.

The only exception to this pattern is an example included in Subsection (D): "limiting curricular or extra curricular activities (or participation therein by children) *in order to* avoid the participation of minority group children in such activities." But this unusual case hardly establishes the rule. On the contrary, here, we can readily appreciate that a mere effect test would be wholly out of place: it would automatically condemn every decision not to offer a particular course or program, however benign or however dictated by budgetary exigencies.

The evidence from parallel provisions, then, is very clear that, for the limited purposes of ESAA, Congress was determined to avoid financial support of practices that effectively perpetuated discrimination, whether or not so intended.

4. The same conclusion is indicated when we go beyond Section 1605 and examine the statutory declaration of policy which prefaces the Act. First, we notice the express congressional concern with "minority group isolation" and the purpose to encourage its elimination. 20 U.S.C. 1601.[12] The focus is on the adverse *effect* of that situation, not the cause.

[12] The full text of Section 1601 is as follows:

"(a) The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.

"(b) The purpose of this chapter is to provide financial assistance—

"(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;

This is made even plainer in Section 1602(a).[13] Here, Congress declares it to be "the policy of the United States" that ESAA shall be implemented "uniformly in all regions of the United States in dealing with *conditions of segregation* by race." The italicized phrase is obviously chosen to reach *de facto* situations, regardless of fault. But even this is not left to inference: the provision expressly continues: *"without regard to the origin or cause of such segregation."* Since all "guidelines and criteria," presumably including those governing eligibility, must be "uniformly applied" regardless of "origin or cause," it must follow that they should look to effect, not purpose.

5. Not surprisingly, the legislative history of the statute is entirely consistent with our reading of the text. What is most relevant are the debates surrounding the so-called "Stennis Amendment," now Section 602(a), *supra.*

The idea of a uniform standard, applicable North and South, was proposed by Senator Stennis in April 1971 in the debate on proposed legislation known as the "Emergency School Aid and Quality Integrated Education Act of 1971." The proponents of the amendment argued that Southern school districts were being

"(2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and

"(3) to aid school children in overcoming the educational disadvantages of minority group isolation.

[13] Section 1602(a) provides:

"It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation."

required to desegregate their schools in order to receive emergency school assistance, while school districts in other areas of the country could continue to receive federal assistance in spite of existing conditions of segregation. As Senator Eastland put the matter (117 Cong. Rec. 11511 (1971)):

> The Stennis amendment would provide that there be a national school policy applied equally to all States, localities, regions, and sections of the United States. The adoption of this amendment would help to eliminate the use of the "double standard," which has resulted in the requirements for the integration of the public schools being given a very stringent application in the South and a very lenient application elsewhere.

And again (*id.* at 11512):

> I have never been able to understand how a 10-year-old colored student in a public school in Harlem, Watts, or South Chicago, is expected to look around and see nothing but black faces in his classroom and say to himself: "This kind of racial separation does not hurt me because the State of Illinois does not have a law requiring me to attend all-black schools. I should not feel hurt by this racial separation because it is the result of housing patterns that just accidentally developed.

The opponents of the amendment were concerned only that it not be read as cutting back desegregation efforts in those states which had segregated their schools by law. See, *e.g.*, 117 Cong. Rec. 11517 (1971) (remarks of Senator Mondale). As petitioners correctly point out (Br. 39), the opposition centered more on the portions of the amendment which applied to Title VI and the Elementary and Secondary Education Amendments of 1966 than to ESAA itself. For instance, Senator Javits remarked (*ibid.*):

> * * * If the Senator from Mississippi would confine his amendment to this act, where we have a quite different purpose in mind, I would look at it with much more sympathy, but if it is intended to make prosecutions of violations of the law more difficult, I would oppose it. * * *

The "quite different purpose" of ESAA to which Senator Javits was referring was "to combat all types of segregation, whether de facto—racial isolation—or de jure." *Ibid.*

The Stennis amendment was adopted on April 22, 1971, 117 Cong. Rec. 11520, and was included in the final version of ESAA when it was passed as Title VII of the Education Amendments of 1972, Pub. L. No. 92–318, 86 Stat. 235 *et seq.*[14] As Senator Stennis himself summarized his proposal in the final debate of May 1972 (118 Cong. Rec. 18844 (1978)):

> For the first time, if this conference report is adopted and the bill is signed into law, we will have a uniform national policy in school desegregation matters, North, South, East and West applied uniformly without regard to the origin or cause of such segregation. That is the Stennis amendment, pure and simple.

In sum, the legislatively history of Section 1602(a) tells us that the provision means what it says: that, so far as ESAA is concerned, the same standard should govern nationwide, to *de facto* segregation as to *de jure* segregation—which strongly suggests, if indeed it does not mandate, eligibility rules that focus on actualities, not history—on consequences, not intent.

---

[14] See H.R. Rep. No. 92–1085, 92d Cong., 2d Sess. 212–213 (1972), explaining the treatment of the House and Senate versions of this provision when the bill went to conference.

6. Finally, our conclusion is confirmed by a consideration of the general scheme of this limited statutory program, viewed in the light of the prevailing wisdom when it was enacted. Indeed, there is no disagreement as to the philosophy underlying the Act.

Petitioner correctly points out that those who wrote ESAA recognized that racial isolation, whatever the cause, was harmful to the children involed and ought to be alleviated, if possible (Pet. Br. 32–33). But it was generally believed that the courts, implementing the Constitution, could not reach "*de facto* segregation" (*id.* at 28–30). Nor was the Congress itself minded to *mandate* a change in the status quo (*id.* at 22–23). And so, the solution adopted was to employ the "carrot" approach "to encourage the voluntary elimination, reduction, or prevention of minority group isolation." 20 U.S.C. 1601(b)(2).

It seems evident that, with such a starting point, it would make no sense to grant funds to school districts that, although not violating the Constitution, were maintaining a segregated system. To treat as ineligible only applicants with a guilty past or a conscious present intent to perpetuate racial isolation would defeat the objective of ending segregation, *de facto* as well as *de jure*. To accomplish its full goal, the program must withhold funds from all agencies doing less than reasonably might be expected to reduce racial isolation, whatever its cause. In our submission, that is precisely what Congress intended, and the Secretary has faithfully heeded the legislative directive.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General,
DREW S. DAYS, III,
Assistant Attorney General,
LOUIS F. CLAIBORNE,
Deputy Solicitor General,
JESSICA DUNSAY SILVER,
MARIE E. KLIMESZ,
VINCENT F. O'ROURKE, JR.,
Attorneys.

JULY 1979.

○